

Developmental Disabilities Institute, Inc., Employer-Petitioner and Local 2413, Developmental Disabilities Institute Teachers Association, New York State United Teachers, AFT, AFL-CIO.
Case 29-UC-492

August 17, 2001

DECISION ON REVIEW AND ORDER
BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND TRUESDALE

On October 10, 2000, the Regional Director for Region 29 issued a Decision and Order Clarifying Unit in the above-entitled proceeding in which he found that the newly created position of “therapy assistant/psychology” is an accretion to the existing bargaining unit of “instructional employees” employed by the Employer in its Children’s Day Services program in Smithtown, New York. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review, maintaining that the therapy assistants/psychology are not an accretion to the existing bargaining unit, because they do not share a sufficient community of interest with members of that unit. Further, the Employer maintains that the Regional Director erred in applying the accretion standard set forth in *The Sun*, 329 NLRB 854 (1999).

By Order dated December 20, 2000, the Board granted the Employer’s request for review. There were no briefs filed on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully reviewed the entire record, we have decided to affirm the Regional Director’s decision. As we discuss below, however, we find that the therapy assistants/psychology do not constitute an accretion to the existing bargaining unit; rather, we find that it is appropriate to clarify the existing unit to include this newly-created classification because these employees perform the same basic functions historically performed by the members of the bargaining unit. See *Premcor, Inc.*, 333 NLRB No. 164 (2001).

The facts are not in dispute. The Employer provides educational, social, and health-related services for developmentally disabled children and adults. Its Children’s Day Services program serves approximately 240 children and young adults between the ages of 3 and 21. The majority, if not all, of the students in this program are autistic.

The Employer and the Union have had a collective-bargaining relationship for several years, covering a unit of approximately 126 teachers and assistant teachers.

The most recent contract was effective from July 1, 1996, to June 30, 2000.¹ In the late fall of 1999, the Employer created the position of therapy assistant/psychology. Although the program employs other therapy assistants in various departments—including vocational, adaptive physical education, and opti-health care—no therapy assistant classification has ever been included in the bargaining unit. The Employer maintains that the new therapy assistant/psychology position also is a nonunit position, and it has not applied the contract to the six employees presently in this classification.²

Most of the children in the Children’s Day Services program exhibit some form of disruptive behavior which occasionally is violent, and which interferes with their ability to function in a regular classroom setting. These children require intensive instruction in classes which normally consist of six children, conducted by one teacher and two assistant teachers. Individual education programs [IEPs] are formulated by the Employer’s committee on special education, together with the child’s teacher and parent(s). Each child’s IEP charts a series of short and long-term goals, including the modification of disruptive behavior and the teaching of various skills, which the teachers and teachers’ assistants are expected to follow.

The collective-bargaining agreement provides that the program’s teachers have overall responsibility for the administration and educational maintenance of their classes. They may not alter the IEPs of their students, and they are expected to work closely with the psychology supervisor. They are responsible for routing data sheets to various managers, graphing some of the data, and preparing various notes and summaries. The teachers have varying degrees of expertise, have completed either a B.A. or an M.A., and may or may not be certified by the State. The teachers and assistant teachers are supervised by the building principal who also is the assistant director for administration.

Two assistant teachers are assigned to each regular classroom. The Regional Director found that assistant teachers substitute for the teachers when they are absent, and that one, Barbara Bombace, substituted for her regular teacher for an extended period of time during the past year. Duties and responsibilities of the assistant teachers include, inter alia, assisting students upon arrival and

¹ Historically, all employees covered by the contract have been in one of two classifications: teacher and assistant teacher.

² The Union filed an unfair labor practice charge in Case 29-CA-23460, alleging, inter alia, that the creation of this position and the failure to apply the contract to the employees occupying it, is a violation of Sec. 8(a)(5). The portion of the charge alleging the failure to apply the contract has been held pending the disposition of the instant case.

departure at school; collecting data on student behavior and performance;³ providing one-on-one instruction and small group instruction under the teacher's direction; and testing children on their understanding of various concepts, such as quantity and the meaning of the word "more." The assistant teachers have ongoing training, usually once a week. These sessions are held on two different days, so that if someone is unable to attend on one day, they can still attend the other session. They also meet weekly with the psychology supervisor and sometimes with the speech and occupational therapist, to discuss a specific child's progress and/or problems. Bombace, who has been an assistant teacher since 1991, testified that she has written up behavioral protocols that had been approved for implementation by the psychology supervisor. However, Assistant Director Kim Tynan stated that it is unusual for an assistant teacher to develop protocols or to write up data sheets. According to the Employer, Bombace's added responsibilities were a result of her extensive experience and the fact that she spent a considerable period of time substituting for her regular teacher.

John Warner, director of Children's Day Services, testified that the position of therapy assistant/psychology was created to deal with six of the children whose behavior had become so severely disruptive that it was affecting the regular, six-student, classrooms. Their behavior not only was interfering with the IEPs of the other children, it was self-injurious and posed a threat to the safety of the other children as well as to the teachers. Thus, the position of therapy assistant/psychology was created in order to provide one-on-one instruction for each of these six children, and they were removed from the regular classroom. Four of the children were placed in separate rooms—each with an assigned therapy assistant. The remaining two share one room with a separate therapy assistant assigned to each. The Employer intends to return these children to the classroom once their destructive behavior has become manageable.⁴

The Employer filled the six new positions from within the program. Two of the six were formerly assistant

teachers and one was a teacher.⁵ Warner testified that the Employer was seeking individuals who previously had demonstrated an ability to work with severely troubled children. No academic degree was required, and although the Employer maintained that the therapy assistants are required to have extensive training, the record showed that no special training was given to the individuals selected before they assumed these positions.⁶

The therapy assistants are supervised by team leader Cindy Burger, who in turn reports to Tynan, who has an M.A. in applied behavior analysis.⁷ They meet with their team leader both before and after sessions with their pupils. Tynan and the psychology supervisor often are at these meetings as well. They also attend quarterly meetings with the children's parents and other therapists (e.g., speech or physical therapy).

The therapy assistants are expected to meet the school buses when they arrive in the morning. They escort their students from the bus to the classroom where they spent most of the day alone with the child, monitoring and attempting to lessen the severity of the disruptive behavior—utilizing applied behavior analysis methods. They record the child's destructive behaviors on data sheets, including the number of times the child engages in such behavior. Subsequently, they or their team leader may graph the results. The therapy assistants independently may modify the child's behavioral protocol during the course of the day; however, they do not have the authority to modify the child's IEP. Once the disruptive behaviors have been brought under control, the therapy assistant can introduce other educational activities, including the teaching of communication skills.

It is well established that a unit clarification petition is appropriate for resolving ambiguities concerning the unit placement of individuals who come within a newly created classification. *Union Electric Co.*, 217 NLRB 666, 667 (1975); *Bethlehem Steel Corp.*, 329 NLRB 241 (1999). In the instant case, the Union maintains that the individuals filling the position of therapy assistant/psychology have the same duties that have been performed by, and are still being performed by, the assistant teachers, including working in an intensive relationship with specific students; monitoring and recording data on the students in numerous activities; assisting the child in a variety of ways; and attempting to lessen the severity of the disruptive behavior in which these children engage.

³ This data includes, e.g., recording whether the child says "please" or "thank you," or exhibits a substantial degree of disruptive behavior such as spitting or self-injury; and filling in a toilet training sheet which includes every time the child goes to the bathroom. Most of the data collected appears to be the same type of data collected by the disputed therapy assistants.

⁴ At the time of the hearing, apparently one of the original six children already was being reintroduced to the classroom. It was unclear how much longer the other five would remain in the program or whether other children will be placed in the program in the future.

⁵ There was no specific information about the other three who were selected.

⁶ The record was not clear as to whether they participate in the ongoing training described above.

⁷ It is unclear, however, who evaluates the therapy assistants.

The Employer, on the other hand, contends that these therapy assistants are not “instructional employees” because their principal activity is to modify disruptive behavior and not to provide classroom instruction. Further, they have a significantly greater degree of initiative and self-direction in the management and oversight of the students than that of the assistant teacher, who works under the direction and instruction of the teacher who is responsible for the classroom.

We find that the therapy assistant/psychology classification is properly included in the unit. As the record establishes, and as the Regional Director found, the disputed therapy assistants perform the same basic educational functions that historically have been performed by bargaining unit members. In this regard, they work with the same children formerly taught by the teachers and their assistants. Further, since virtually all the students in the program are challenged by varying degrees, the therapy assistants/psychology, teachers, and assistant teachers all utilize applied behavior analysis on a daily basis both to modify behavior and to attain other educational goals. All the children require intensive relationships and monitoring. Further, the immediate goal of the therapy assistants/psychology is to return each child to a regular classroom situation, and their ultimate goals of behavior modification and learning are the same as those of the teachers and assistant teachers.

Similar data is collected and recorded for all the children, using the same forms; and the therapy assistants, like the teachers and assistant teachers, have frequent contact with the psychology supervisor regarding the progress of each child. Contrary to the Employer’s assertion, there is no evidence that these therapy assistants/psychology have been more intensively trained than the assistant teachers who have weekly training sessions. Further, although the therapy assistants/psychology may have more autonomy than the assistant teachers, the teachers are granted at least as much discretion in the manner in which they run their classrooms. As the disputed therapy assistants/psychology perform the same functions that historically have been performed by unit employees, we find that they are appropriately included in the unit. *Premcor*, supra.

While we agree with the Regional Director that the unit should be clarified to include the classification of therapy assistant/psychology, we disagree with his application of an accretion analysis and his finding that they are an “accretion” to the unit.⁸ Once it is established that

a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as belonging in the unit rather than being added to the unit by accretion. *Premcor*, supra. Accordingly, an accretion analysis in these circumstances is inapplicable.⁹

ORDER

The contractual collective-bargaining unit covering all the instructional employees at the Developmental Disabilities Institute represented by Local 2413, Developmental Disabilities Institute Teachers Association is clarified to include the position of therapy assistant/psychology.

CHAIRMAN HURTGEN, concurring.

I concur in the result. However, I wish to limit the holding of this case.

The majority states:

Once it is established that a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as remaining in the unit rather than being added to the unit by accretion.

I agree that where a new classification clearly falls within a unit description, and the employees in that new classification are employed at the unit facility, these employees are in the unit, and no “accretion” analysis is required. In the instant case, the unit covers “instructional employees.” Previously, only teachers and assistant teachers fell within that category. In my view, the new position of therapy assistant/psychology clearly falls within the term “instructional employee.” These employees “instruct” the students just as teachers do, albeit they deal one-on-one with students who have particularly severe problems.

In the above-limited circumstances, i.e., where new employees clearly fall within the unit description, I agree that an accretion analysis is not necessary.¹ However,

unit. 333 NLRB No. 164, slip op. at 2. See also *Towne Food Sales*, 270 NLRB 311 (1984).

Chairman Hurtgen agrees with his colleagues that the case does not involve the accretion doctrine. He does not agree that an ordinary “community of interest” analysis is used in accretion cases. See his dissenting opinion in *The Sun*, supra, which sets forth his views on accretion.

⁹ The accretion analysis used in this case by the Regional Director is inapplicable in any event. As the Employer points out, *The Sun*, relied on by the Regional Director, involved a bargaining unit which was functionally described. In the instant case, the unit is not functionally described. See *Archer Daniels Midland Co.*, 333 NLRB No. 81 (2001).

¹ See *Premcor, Inc.*, 333 NLRB No. 164. In that case, the unit description included production and maintenance employees, and the position of Operator I fell within the scope of the unit. The Operator I

⁸ As we recently discussed in *Premcor*, supra, in the traditional accretion analysis, the Board examines community-of-interest factors to determine whether the employees at issue may constitute a separate appropriate unit or constitute an accretion to the existing bargaining

the mere fact that a new classification performs “the same basic functions as a unit classification historically had performed” is insufficient to dispense with an accretion analysis. That is too slippery a slope. It would include, for example, employees who work at a different

classification was being eliminated and the new classification would perform essentially the same functions as the Operator I.

facility, or employees who are functionally similar to unit employees but who do not fit within the unit description. In such cases, I would employ an accretion analysis. And, in my view, a finding of accretion depends upon an “overwhelming community of interest.”²

² See my dissent in *The Sun*, 329 NLRB 854 (1999).